No. 14,923

United States Court of Appeals

For the Ninth Circuit

MARTIN JIMENEZ,
Appellant,

vs.

BRUCE BARBER, District Director of the Immigration and Naturalization Service for the Thirteenth Immigration District,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S PETITION FOR A REHEARING AND HEARING EN BANC.

McMURRAY, BROTSKY, WALKER,
BANCROFT & TEPPER,
LLOYD E. McMURRAY,
785 Market Street, San Francisco 3, California,
Attorneys for Appellant and Petitioner.

Subject Index

Table of Authorities Cited

Cases

Constitutions

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To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now appellant herein and petitions this Court for a rehearing on the merits and for a hearing *en banc*. The grounds for this petition are three:

1. In its decision of July 12, 1956, this Court relied principally upon a decision of the Supreme Court which that Court is now reexamining.

2. This Court in its opinion on the merits failed to acknowledge certain constitutional issues which this Court had earlier found present in the case and which are necessary to its decision.

3. The case has been passed upon by two different panels of the Court. The two panels expressed different views about the constitutional issues. A hearing *en banc* is necessary to obtain a decision which truly reflects the views of the Court.

ARGUMENT.

I. THE UNITED STATES SUPREME COURT IS REEXAMINING THE DECISION ON WHICH THIS COURT RESTED ITS OPINION.

To the extent that the Court recognized the presence of constitutional issues in this case, it rested its decision upon a case which the United States Supreme Court has now agreed to reexamine. In its opinion of July 12, 1956, this Court said:

> "But in any event such questions were relevant and were within the legitimate area of inquiry in such a case as this. *Cf. Galvan v. Press,* 1954, 347 U.S. 522 . . ."

The *Galvan* case found constitutional a statute which allowed deportation for prior membership in the Communist Party. Although it cannot be said to be a square holding on the point at issue in the case at bar, it bears a direct relation to the question in this case. The case at bar concerns the propriety of asking questions about membership in the Communist

Party and other questions about association and political activities as a necessary step in establishing eligibility for suspension of deportation. The theory upon which such questions are relevant rests upon the fact that the statute denies suspension of deportation to those who are deportable by reason of membership in the Communist Party at any time since entry.

The decision of this Court, therefore, must be read as holding that questions about membership in the Communist Party and similar questions are relevant to determine eligibility for suspension of deportation because one who has been a member of the Communist Party is deportable therefor, and hence is excluded from eligibility for suspension of deportation. If it should be held that deportation for prior membership in the Communist Party is not constitutional, then the authority for this Court's decision would fall. The possibility that such a result may obtain in the next few months is presented by the grant of certiorari to the Eighth Circuit in the case of *Rowoldt v. Perfetto,* 24 Law Week 3217 (opinion below 228 F. 2d 109). This case is now No. 34 on the docket for the October 1956 term.

In *Rowoldt v. Perfetto* the two questions presented to the Supreme Court are (1) whether evidence of petitioner's membership in the Communist Party was sufficient to support his deportation, or whether it showed only nominal membership which would not authorize deportation; (2) whether the 1952 statute's provision for deportation for past Communist Party membership is unconstitutional on its face or as ap-

plied. 24 L.W. 3217. This last issue is the issue which was passed upon in *Galvan v. Press.*[1]

Even without reexamination by the Supreme Court of the *Galvan* decision, there is a serious question whether this Court correctly interpreted that decision. As we pointed out in our motion for a stay of deportation, the *Galvan* case did not pass upon the question whether a statute allowing deportation for prior membership in the Communist Party, without evidence of the nature of the party and without evidence of scienter of the nature of that organization is a bill of attainder in violation of Article I, Section 9, Clause 3 of the Constitution. The reason for a failure to pass upon this question appears clear from the facts of the case as related in the Supreme Court's decision. Galvan was in no position to argue that the Communist Party was not an organization advocating overthrow of the government by force and violence or that its character was not known. He evidently agreed that the organization did so advocate, for as appears by a footnote in the Supreme Court decision he offered to return to the Communist Party as an informer and spy for the government. The question whether the statute is a bill of attainder has not been passed upon by the Supreme Court in any case and still remains undecided.

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[1]This is the second time the Court has granted certiorari in a case involving the *Galvan* rule. In *Garcia v. Landon,* 207 F. 2d 693, the Supreme Court granted certiorari to this Court, and the Government prevented a decision on the case only by granting the alien relief by administrative action and then having the case dismissed as moot. This Court cites *Garcia* in this case, along with *Galvan.*

This view of the *Galvan* case has been seen by the panel of this Court which passed upon the motion for stay of deportation. In the decision of October 13, 1955, in this case, this Court noted:

> "The Supreme Court recently declined to decide the issue of the constitutionality of basing governmental action on memberships and associations. See *Peters v. Hobby,* 349 U.S. 331 (1955). We do not understand that *Galvan v. Press,* 347 U.S. 522 (1954), is necessarily decisive of the issue in this case. Likewise the scope of the bill of attainder clause is unclear as applied to the taking away of a right or privilege because of belief, memberships or associations. *Cf. American Communications Association CIO v. Douds,* supra; *Garner v. Board of Public Works of Los Angeles,* 341 U.S. 716 (1951); with *United States v. Lovett,* 328 U.S. 303 (1946). These are questions worth argument."

The panel of this Court which wrote the decision on the merits evidently accepted the *Galvan* case uncritically for the proposition that deportation for past membership in the Communist Party is in all instances constitutional. When the Supreme Court finds that question undecided, or if decided then worthy of reconsideration, this Court which has interpreted the *Galvan* decision in two inconsistent ways, should review the question at length.

II. THE COURT FAILED TO PASS EXPRESSLY ON CONSTITUTIONAL ISSUES WHICH ARE NECESSARILY INVOLVED IN THE DECISION.

Without discussion this Court in its decision on the merits has decided that neither the First or the Fifth Amendments nor the prohibition against bills of attainder exercises any restraint on the power of the government to initiate or withhold governmental action upon condition that the political ideas and associations of an alien are pleasing to the administration in power. It is not the province of a petition for rehearing to argue the merits of the questions raised, but it is proper to point out that such a decision should be made only with the fullest expression of opinion and the most complete consciousness of the implications of the decision in the conduct of public affairs of this democracy.

The broad implications of the decision of this Court are inescapable. They are set forth below.

When this Court said:

> ". . . in any event such questions were relevant and were within the legitimate area of inquiry in such a case as this"

it was referring to questions about membership in or affiliation with organizations, including a political party. The necessary implication of the decision is therefore that governmental action having a direct impingement on a person within the United States may be initiated or withheld by reason of political opinion and association. This is a departure from

the view long held in the United States and throughout the world that political orthodoxy was a concept unknown to the law of the United States.

It may be that this Court feels that membership in the Communist Party is an inquiry, not into a question of political belief or association but into criminal association and activity. There can be no doubt that criminal activity may be a relevant consideration in determining whether to offer or withhold governmental action, but to conclude in this case that the Communist Party is a criminal organization is to take judicial notice of a question of fact as to which there is no evidence in the record. In *Ex parte Fierstein,* 41 F. 2d 53, this Court expressly declined to take judicial notice of this matter, and the law as expressed in that decision appears to be consistent with all the law in the United States prior to the decision on which we are here seeking a rehearing.

Further, the Court in deciding that the question of membership is relevant in this case is necessarily deciding that membership alone is a basis upon which governmental action may be based. The questions asked of the appellant, the materiality and relevancy of which are questioned in this action, were questions about membership, not about activities of a criminal nature. That is, the question was not, "Have you ever participated in a conspiracy designed to overthrow the Government of the United States?" or any variant of such a question, but, "Have you ever been a member of the Communist Political Association or

of the Communist Party?'' Although the Supreme Court in *Wieman v. Updegraff,* 344 U.S. 183, held unconstitutional state action which denied a privilege (teaching in the public schools) on the basis of membership in an organization alone, this Court finds no constitutional impediment to such action on the part of the federal government. Yet it does not attempt to distinguish Wieman.

There can be little doubt that requiring one to forego political activity or membership as a condition of affording a governmental privilege is an abridgement of free speech. Without saying so, this Court has necessarily held by implication that such an abridgement of free speech is constitutional at least where membership in the Communist Party or the Communist Political Association is the determining factor. In *American Communication Associations CIO v. Douds,* 339 U.S. 382, the Supreme Court held that such abridgements of free speech must stand or fall by the nature of the governmental interest as measured against the degree of invasion of free speech. Although there is neither evidence nor argument before the Court to the effect that the governmental interest in deporting members or former members of the Communist Party is one closely linked to the internal security or the general welfare of the United States, this Court apparently has decided that question as a matter of law. It is the rule of this case that the governmental interest in deporting persons identified as members or past members of a certain organization is sufficient to override the guar-

antee of free speech contained in the First Amendment.

Another necessary implication of the decision in this case, which if it was intended should be express and not implicit, is that penalties may be inflicted by legislative fiat and without judicial trial upon members of a named group without conflict with the bill of attainder clause of the Constitution (Art. I, Sec. 9, Clause 3). No previous authority exists for such a decision. Although the Courts have held that the prohibition against *ex post facto* laws does not apply to deportation statutes because they are not penal, there are no such decisions with regard to the bill of attainder clause. *Cummings v. Missouri,* 4 Wall. 277; *Ex parte Garland,* 4 Wall. 333; *United States v. Lovett,* 328 U.S. 303, all held unconstitutional as bills of attainder legislative enactments which withheld governmental privileges from citizens. In *Burges v. Solomon,* 97 U.S. 381, the collection of a tax on tobacco under certain circumstances was held to be "civil punishment". This Court ignores those decisions.

III. THE COURT SHOULD HEAR THIS CASE EN BANC.

Two panels of this Court have considered whether there are serious constitutional questions raised by this case. On October 13, 1955, one panel consisting of Judges Denman, Orr and Chambers ruled that there were several constitutional issues in the case.

They pointed out that there was a question whether the "indirect, conditional, partial abridgement" of free speech involved in this case was one which was constitutional as tested by a balance of the nature of the governmental interest against the degree of invasion of free speech. They pointed out further that the Supreme Court had recently declined in *Peters v. Hobby,* 349 U.S. 331, to decide the issue of the constitutionality of basing governmental action on memberships and associations. The Court said further:

> "We do not understand that Galvan v. Press, 347 U.S. 522 (1954) is necessarily decisive of the issue in this case."

The Court noted that the scope of the bill of attainder clause was unclear in such cases as this and noted the principal cases bearing on that question. The Court concluded:

> "These questions are worth argument."

A second panel, consisting of Judges Denman, Hastie and Tolin passed upon the merits of the case on July 12, 1956. That Court found no constitutional questions which it expressly recognized, and to the extent that constitutional questions are decided by its opinion they are done so without explicit answers to the questions which the earlier panel noted in this case.

It is not necessary therefore to rely upon inference alone in saying that the decision of a single panel cannot correctly state the views of the entire Court. The differences among members of the Court on this

case are demonstrated. In such a situation the parties are entitled to a hearing *en banc.*

Dated, San Francisco, California,
August 9, 1956.

Respectfully submitted,
McMurray, Brotsky, Walker,
Bancroft & Tepper,
By Lloyd E. McMurray,
Attorneys for Appellant and Petitioner.

Certificate of Counsel.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
August 9, 1956.

Lloyd E. McMurray,
Of Counsel for Appellant and Petitioner.